

University of St. Thomas Law Journal

Volume 17

Issue 1 *Restorative Justice, Law, and Healing
Symposium*

Article 9

November 2020

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Recommended Citation

Priya Elayath, *Americans with Disabilities Act's Title III Public Accommodations and Its Application to Web Accessibility and Telemedicine*, 17 U. ST. THOMAS L.J. 156 (2020).

Available at: <https://ir.stthomas.edu/ustlj/vol17/iss1/9>

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NOTE

AMERICANS WITH DISABILITIES ACT'S TITLE III PUBLIC ACCOMMODATIONS AND ITS APPLICATION TO WEB ACCESSIBILITY AND TELEMEDICINE*

PRIYA ELAYATH**

INTRODUCTION

Technology has become a significant part of our lives. It is constantly expanding and evolving. It provides information and services to individuals and allows people to connect from great distances. The internet plays a central role in the expansion of technology—from creating new methods of communication to the growth of online shopping. Most companies and many individuals make regular use of online spaces offering products and services. Technology brings innovation and ease to our daily lives, but with this also comes growing concerns. Many of these revolve around data security and privacy. However, there is an additional pressing concern: accessibility, specifically access for individuals with disabilities. If these online spaces are not compatible with assistive devices used by individuals with disabilities, a significant group of people will be excluded from an important part of economy and society. With the prevalence of internet usage and reliance, it is time to address how the digital age will bridge the gap for those with disabilities, especially because these are the people who can benefit most from these technological advancements.

* This note was written prior to the COVID-19 pandemic and its resulting impact. Telemedicine is now more widely used by the general public because going into a hospital or clinic has become less preferred for many people. Though this note does not address the pandemic, this discussion has become increasingly important as telemedicine is offered by more healthcare services.

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One in four Americans (approximately sixty-one million) have a disability impacting major life activities.¹ Disability is the only minority status that any individual in the world can acquire at any point in his or her life. You cannot change your skin color, nor can you change your ethnicity. But you can become disabled at any time, all of a sudden or gradually. In the global market, there are almost two billion people with disabilities, which is larger than the size of the market of China.² This large subset of individuals also controls over \$13 trillion in annual disposable income.³ So, why are we not doing everything we can to ensure this population can access goods and services? Accessibility often improves the online experience for all users, with disabilities or not.⁴

The internet and other technological advances have not only transformed various commercial industries, but also have changed healthcare access and delivery. Every person interacts on some level with the healthcare system, and access to this system is especially vital for those with disabilities. One of the most interesting technological advancements in the healthcare industry has been telemedicine. Telemedicine⁵ refers to the use of telecommunications technologies “for the exchange of valid information for diagnosis, treatment and prevention of disease and injuries, research and evaluation, and for the continuing education of health care providers.”⁶ Because technology is continuously advancing, telemedicine will constantly evolve, adapting to changing healthcare demands.⁷

1. CDC: *1 in 4 US Adults Live with a Disability*, Ctrs. for Disease Control and Prevention (Aug. 16, 2018), <https://www.cdc.gov/media/releases/2018/p0816-disability.html>.

2. Return on Disability Group (Sept. 1, 2020), *Return on Disability*, 2020 Annual Report: The Global Economics of Disability, available at <https://www.rod-group.com/sites/default/files/2020%20Annual%20Report%20-%20The%20Global%20Economics%20of%20Disability.pdf>.

3. *Id.*

4. See Paul Flahive, *Inside the Movement to Improve Access to High-Speed Internet in Rural Areas*, NAT'L PUB. RADIO, (Sept. 20, 2019, 5:02 PM ET), <https://www.npr.org/2019/09/30/765834528/inside-the-movement-to-improve-access-to-high-speed-internet-in-rural-areas>. For example, those in rural areas may not have the same opportunities or resources to online spaces. *Id.* Broadband internet is taken for granted by most Americans; however, approximately 21 million people who live in rural areas do not have access to high-speed connections. *Id.* at 00:16. Improving access for these individuals could be essential, whether that is implementing better connections or improving access in other innovative ways (e.g. telemedicine could allow those in rural areas to access renowned doctors without having to find or pay for transportation). *Id.*

5. The American Academy of Family Physicians defines telemedicine as “the practice of medicine using technology to deliver care at a distance” and telehealth “refers broadly to electronic and telecommunications technologies and services used to provide care and services at-a-distance.” American Academy of Family Physicians, *What's the Difference between Telemedicine and Telehealth?*, AAFP, <https://www.aafp.org/media-center/kits/telemedicine-and-telehealth.html> (last visited Dec. 19, 2019). Because telemedicine is the most popular term colloquially, for the purpose of this paper, telemedicine is used to encompass both definitions.

6. WORLD HEALTH ORG., *TELEMEDICINE: OPPORTUNITIES AND DEVELOPMENTS IN MEMBER STATES 8–9*, Global Observatory for eHealth Series Volume 2 (2010), https://www.who.int/goe/publications/goe_telemedicine_2010.pdf.

7. *Id.* at 9.

Telemedicine is not a new health care delivery service, but it has become more prevalent and popular. It uses two-way, real time interactive communication between patients and health care providers at another site. A patient can access a physician using software on her laptop or tablet and receive care without physically going to her physician's clinic. It can improve "patient-physician collaborations, increase access to care, improve health outcomes by enabling timely care interventions, and decrease costs."⁸ The World Health Organization (WHO) has identified four main characteristics of telemedicine: (1) "its purpose is to provide clinical support"; (2) "it is intended to overcome geographical barriers, connecting users who are not in the same physical location"; (3) "it involves the use of various types of [information and communication technologies]"; and (4) "its goal is to improve health outcomes."⁹

One of the most significant benefits of telemedicine is increasing health care access. This is especially important for those who might otherwise have limited access for a variety of reasons, including those living in rural areas and people with disabilities. For example, a person in stroke rehabilitation can, in the comfort of his home, attend occupational therapy appointments by using a tablet smart glove.¹⁰ He puts the smart glove on his weakened hand with position sensors on his fingers and wrists. The glove is attached via Bluetooth to a tablet, which enables him to do activities to strengthen his hand and arm muscles. The therapist can communicate with him through video chat, watch his movements during scheduled appointments, and track his progress and mobility improvement.

We need to prioritize the reduction of barriers to those with disabilities. Imagine your child with severe mental and physical disabilities requires consistent monitoring for breathing issues. If a problem arises, traditionally, you would either have to call 911, rush your child to the doctor, or attempt to speak to a provider over the phone (usually struggling to explain exactly what is happening). With telemedicine, you would be able to make quick contact with a covered health care provider who can see your child and assess the situation. The provider would be able to administer care and determine whether it is even necessary to make an office visit. You and your child could potentially avoid an office visit or ambulance ride altogether, which would reduce your costs and save you time. Alternatively, picture you are wheelchair bound and have other physical disabilities. Going to your doctor's office by yourself is a hassle. You have to go to the other side of the building for ramp access, and then back around for the elevators. And you are unable to sit on the exam table. How would you feel

8. American Academy of Family Physicians, *Telehealth and Telemedicine*, AAFP (July 2016), <https://www.aafp.org/about/policies/all/telemedicine.html>.

9. World Health Organization, *supra* note 6, at 9.

10. See RAPHAEL, <http://www.raphaelhome.com/us> (last visited Dec. 19, 2019); NEOFECT, <https://www.neofect.com/en/product/stroke-therapy-hand> (last visited Dec. 19, 2019).

if you found out there was an option to escape this burden? Through telemedicine services, you would be able to access your doctor within the comfort of your home. If all you need is a simple consultation to renew your prescription or assess a cold, you would not need to drag yourself through the physical obstacles and difficulties of an in-person office visit. Telemedicine should be accessible for those with disabilities because those are the people who can benefit from it the most.

This note addresses the controversy over including online platforms as places of public accommodation under Title III of the Americans with Disabilities Act (ADA) and how telemedicine fits as a place of public accommodation. Section I examines the background and purpose of the ADA. It outlines the definition of “disability” and the clarifications issued by the ADA Amendments of 2008. It also provides an overview of the substantive sections of the ADA. Section II focuses on Title III of the ADA and the historical application and judicial interpretation of Title III’s “places of public accommodation” to online spaces. It explores how far the definition has expanded in some circuit courts, while being limited in other circuit courts. It also analyzes the constantly changing guidance from the Department of Justice. Section III explores changes in healthcare technology, specifically telemedicine, and how Title III should apply. It also emphasizes how healthcare services (and access) are different from other commercial entities, therefore ensuring access is paramount. In conclusion, I propose that because telemedicine is essential in providing care to those with disabilities (and others without disabilities), it should be considered a place of accommodation and be covered by Title III’s accessibility requirements. This logic also extends to all websites. Due to technological advancement and the inherent need for internet access in today’s society, the benefits of accessibility would apply equally to all websites. Therefore, the ADA should protect the essential services of telemedicine and web accessibility.

I. BACKGROUND: A HISTORY AND OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

Imagine a group of disability rights activists with physical disabilities putting down their crutches, wheelchairs, and other physical aids and crawling up the 100 stairs of the U.S. Capitol building. Known as the Capitol Crawl, this happened shortly before the ADA was passed.¹¹

The Americans with Disabilities Act was a momentous civil rights law enacted in 1990. This Act remains significant in protecting individuals with disabilities from discrimination and allows them reasonable accommoda-

11. See Stephanie K. Thomas, *Capitol Crawl*, VIMEO (Apr. 3, 2019), <https://vimeo.com/328233990>; See also *When the “Capitol Crawl” Dramatized the Need for Americans with Disabilities Act*, HISTORY (July 24, 2020), <https://www.history.com/news/americans-with-disabilities-act-1990-capitol-crawl>.

tions and assistance so they can fully participate in society.¹² The law ensures that individuals with disabilities have access to the same rights and opportunities in employment, state and local government services, and public accommodations as those without disabilities. The statute explicitly states its purpose is:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.¹³

The ADA defines disability as a (1) “physical or mental impairment” that “substantially limits” the “major life activities” of the individual; (2) a record of an impairment; or (3) being “regarded as” having an impairment.¹⁴ The first prong is known as an actual disability. It encompasses “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems” and “any mental or psychological disorder.”¹⁵ The Equal Employment Opportunity Commission (EEOC) regulations provide examples of each type of disorder, but it is not an exhaustive list. Further, the ADA did not have clear definitions for “substantially limits” and “major life activities.” These terms were left to interpretation by the courts, which has resulted in fairly restrictive interpretations. The second prong includes individuals who have a “history of, or [have] been misclassified as having, mental or physical impairment[s] that substantially limits one or more major life activities.”¹⁶ The third prong applies to an individual who “is subjected to a prohibited action because of an actual or perceived physical or mental impairment” regardless if the condition “substantially limits or is perceived to substantially limit” a “major life activity.”¹⁷ Many of these terms were not initially explicitly defined in the statute and courts were largely left to interpret what disabilities, limitations, and activities satisfied the statute.

12. Victoria L. Thomas & Lawrence O. Gostin, *The Americans with Disabilities Act: Shattered Aspirations and New Hope*, 301 J. AM. MED. ASS'N 95, 95 (2009).

13. 42 U.S.C. § 12101(b) (2018).

14. *Id.* § 12102(1).

15. 29 C.F.R. § 1630.2(h) (2019).

16. *Id.* § 1630.2(k)(1).

17. *Id.* § 1630.2(l)(1).

In 2008, Congress passed the ADA Amendments Act (“Amendment”) implementing some significant clarifications specifically to the “disability” definition along with explaining previous language that was either confusing or had been misinterpreted by courts.¹⁸ The purpose of the Amendment was to restore the intent of the ADA.¹⁹ Under the Amendment, individuals are more easily able to establish that they have disabilities within the statute’s meaning.²⁰ The Amendment overturned many U.S. Supreme Court decisions that construed the definition of disability too narrowly and it broadened the coverage of individuals.²¹ The new regulations in the Amendment did not change the ADA’s three-prong definition of disability, but they emphasized that individuals must be covered under the first prong (actual disability) or second prong (record of disability) to qualify for a reasonable accommodation.²² The Amendment did, however, define “major life activities” for the first time, eliminating the need for judicial interpretation; and the EEOC included a robust list of major life activities in its regulations.²³ It also emphasized that the term “substantially limits” should be construed broadly and require extensive analysis.²⁴

The ADA has four substantive sections (called titles) that govern various areas of public life. Title I concerns employment: a covered entity²⁵ cannot discriminate against a qualified individual with a disability when hiring, promoting, training, etc.²⁶ For example, an employer cannot fire someone based on a real or perceived disability. Additionally, these covered entities must provide reasonable accommodations to individuals with disabilities, unless the accommodation would be an undue hardship for the entity.²⁷ Title II regulates public entities and public transportation, as well as outlines standards for physical and programmatic access that prohibit local and state public entities from discriminating against individuals with disa-

18. *Fact Sheet on the EEOC’s Final Regulations Implementing the ADAAA*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (May 3, 2011), https://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm.

19. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 12101, 122 Stat. 3553 (1990) (amended 2008).

20. *Id.*

21. *See Sutton v. United Air Lines*, 527 U.S. 471 (1999) (holding eyesight of myopic twin sisters who were rejected as commercial pilots because their uncorrected eyesight was less than the minimum requirement was not a disability because in deciding whether someone has a disability, all mitigating measures must be considered, twins would not be substantially limited in a major life activity with mitigating measure of glasses or contact lenses); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002) (holding statute’s language “substantially limited” required plaintiff claiming a disability to prove his or her disability “presents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”).

22. 29 C.F.R. § 1630.2(g)(3).

23. 42 U.S.C. § 12102(2) (2018); 29 C.F.R. § 1630.2(i).

24. 29 C.F.R. § 1630.2(i).

25. Covered entities are private employers, state and local governments, employment agencies, and labor unions. It covers employers with fifteen or more employees.

26. 42 U.S.C. § 12112(a).

27. *Id.* § 12112(b)(5)(a).

bilities.²⁸ Title III covers places of public accommodations.²⁹ Individuals with disabilities cannot be discriminated against and prevented from access to full and equal enjoyment of the goods, services, facilities, or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation.³⁰ Title IV requires telecommunications companies to provide functionally equivalent services to individuals with disabilities (especially those with hearing and/or speech impediments).³¹ This paper focuses on Title III, specifically reasonable accommodations in public spaces.

II. DEFINING TITLE III PLACES OF PUBLIC ACCOMMODATION AND HOW FAR IT EXPANDS

Title III of the ADA prevents discrimination on the basis of disability in the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”³² There are four specific categories of discrimination: these places of public accommodation (1) cannot “screen out or tend to screen out” those with disabilities; (2) must make “reasonable modifications” to their policies that are required to allow those with disabilities access to their services; (3) must take necessary steps to prevent those with disabilities from being “excluded, denied services, segregated or otherwise treated differently” simply because of the lack of assistive services; and (4) must remove physical and communicational barriers to use the facilities.³³ This section mandates entities to achieve minimum requirements for accessibility in modifications and/or new construction of facilities.³⁴ It also “directs businesses to make ‘reasonable modifications’ to their usual way of doing things when serving” individuals with disabilities.³⁵ Entities can avoid complying with these provisions if they successfully show that compliance would cause them an undue burden.

The law does not actually define the term “place of public accommodation.” However, it does list twelve categories of private places that qualify as a place of public accommodation:

(A) an inn, hotel, motel, or other place of lodging, [with some exceptions];

(B) a restaurant, bar, or other establishment serving food or drink;

28. *Id.* § 12132.

29. Americans with Disabilities Act: Title III, 42 U.S.C. §§ 12181–88.

30. *Id.* § 12181(a).

31. 47 U.S.C. § 225 (2018); Title IV amended the Communications Act of 1936.

32. 42 U.S.C. § 12182(a).

33. *Id.* § 12182(b)(2)(A).

34. *What is the Americans with Disabilities Act?*, ADA NAT’L NETWORK (Oct. 2020), <https://adata.org/learn-about-ada>.

35. *Id.*

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or post-graduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.³⁶

All of these categories explicitly mention physical locations, and some have broad references, such as “other sales or rental establishment.”³⁷ There is no language explicitly mentioning the internet or online platforms. In the decade prior to the first cases specifically addressing website accessibility, courts that considered other developing forms of technology came up with two contradictory interpretations of the definition of a “place of public accommodation.” Some courts found that the definition encompassed non-physical places, and other courts limited the definition to only physical locations.

A. *Places of Public Accommodation Prior to Courts Addressing Website Accessibility*

Prior to the internet, courts adapted the ADA’s public accommodation requirements to other forms of new technology, such as the telephone and television. As more products and services were provided over the phone or on television, courts were faced with a similar issue of accessibility to goods and services that were not at a physical location.

In 1994, the First Circuit held in *Carparts Distribution Center v. Auto Wholesaler’s Association* that places of public accommodation are not lim-

36. 42 U.S.C. § 12181(7) (2018).

37. *Id.* § 12181(7)(E).

ited to “actual physical structures.”³⁸ This was the first case addressing an interpretation of a “place of public accommodation.” The court reasoned that it “would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not.”³⁹ It used the travel industry as an example. Typically, people do not go to a physical location when booking or amending a flight.⁴⁰ Instead, they conduct that business over the phone (or today, online).

Taking a different approach, in 2002, the Eleventh Circuit applied the nexus test to the question of telephone access.⁴¹ In *Rendon v. Valleycrest Production, Ltd.*, the court determined the phone process for selecting contestants for “Who Wants to be a Millionaire” was discriminatory against people with hearing impairments and hand-mobility impairments.⁴² The court noted that though the selection process itself was not a place of accommodation, there was a nexus between that process and the premises of the public accommodation.⁴³ This was because the individuals were “seek[ing] the privilege” to participate in the show “held in a concrete space,” a physical location.⁴⁴

There has been much debate about whether the internet should be considered a place of public accommodation. Similarly, courts have been split in deciding whether online platforms should be considered places of public accommodation. Some circuit courts and other lower courts have relied on the nexus test, while other courts have expanded application beyond places that only exist in physical spaces to spaces that may only exist on the internet (e.g., Netflix). In 2000, the Department of Justice (DOJ) filed an amicus brief in *Hooks v. OKbridge* publicly arguing—for the first time—that Title III covered online spaces.⁴⁵ Finally, in 2010, the Office of the Attorney General released guidance favoring less restrictive interpretations of which spaces qualify, further broadening the interpretation of websites as places of public accommodation.⁴⁶

38. 37 F.3d 12, 19 (1st Cir. 1994).

39. *Id.*

40. *Id.*

41. *Rendon v. Valleycrest Prod., Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

42. *Id.*

43. *Id.* at 1284 n.8.

44. *Id.* at 1284.

45. Brief of the U.S. as Amicus Curiae Supporting Appellant at 7, *Hooks v. OKbridge, Inc.*, 232 F.3d 208 (5th Cir. 2000) (No. 99-50891).

46. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35–36) [hereinafter “DOJ ANPRM on Web Accessibility”].

B. Circuits Split on Places of Accommodation Applying to Online Spaces

When the ADA was enacted, the internet was not publicly or commercially available⁴⁷ and there were no explicit mentions of advanced technology, resulting in a split in the courts' interpretations of how the ADA applies to online spaces. The Third, Sixth, and Ninth Circuit Courts apply the nexus test when analyzing whether website accessibility falls under the purview of the ADA. Under this test, a website itself is not a place of public accommodation, but if the website has a "nexus" to a physical business then it may be considered a place of public accommodation covered by Title III.⁴⁸ Under this approach, an online-only business without a physical location, such as eBay, would not qualify as a place of public accommodation. One of the first cases applying this nexus test to the issue of whether a website was a place of public accommodation was *Access Now, Inc. v. Southwest Airlines, Co.*⁴⁹ The plaintiffs argued that Southwest's website was inaccessible to people with visual impairments because screen readers could not pick up alternative text.⁵⁰ The court considered the ADA's numerous categories for places of public accommodation and stated that because all the explicit places listed are physical locations, "[expanding] the ADA to cover 'virtual' spaces would be [creating] new rights without well-defined standards."⁵¹ The court went further and concluded that the Southwest Airlines' website did not have a nexus to a physical location, and therefore did not qualify as a place of public accommodation.⁵²

The most significant case centering on website accessibility was *National Federation of the Blind v. Target*.⁵³ It addressed whether regulations on places of public accommodation may apply to websites in general or are limited to physical locations. The National Federation of the Blind (NFB) sued Target Corporation alleging that people with visual impairments were unable to access information or purchase anything on Target's website.⁵⁴ Target filed a motion to dismiss, arguing: (1) only retail stores must provide accessibility accommodations to individuals with disabilities; (2) the ADA only applies to physical accommodations, not the internet; and (3) applying the ADA to websites violates the Commerce Clause of the U.S. Constitu-

47. The World Wide Web as we know it today was invented in 1989 and the European Organization for Nuclear Research (CERN) placed it into the public domain on April 30, 1993. David Grossman, *On This Day 25 Years Ago, the Web Became Public Domain*, POPULAR MECHANICS (Apr. 30, 2018), <https://www.popularmechanics.com/culture/web/a20104417/www-public-domain>.

48. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006).

49. Access Now, Inc. v. Southwest Airlines Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

50. *Id.* at 1314.

51. *Id.* at 1318.

52. *Id.* at 1321.

53. Nat'l Fed'n of the Blind v. Target, 452 F. Supp. 2d at 946.

54. *Id.* at 949.

tion.⁵⁵ Target claimed that “‘discrimination’ is limited to the denial of physical entry to, or use of, a space.”⁵⁶ The court held that the ADA did apply to Target’s website because it is made up of goods and services offered in the actual, physical Target stores.⁵⁷ The court additionally emphasized that the statute specifically states and applies to the services “of” a place of public accommodation, not “in” a place of public accommodation.⁵⁸ It further explained that limiting the place of public accommodation definition to include only the actual premises of a public accommodation would inherently contradict the statute’s plain language.⁵⁹ Though the court held the statute does not only apply to the actual physical location of a place of public accommodation, it also reasoned that, although “the purpose of the [ADA] is broader than mere physical access,” the ADA does not apply to websites that are not associated with physical stores.⁶⁰ The court relied on prior Ninth Circuit decisions not to join other circuits that suggest a place of public accommodation expands beyond physical locations.⁶¹ It relied on the list of physical places in the statute to conclude the definition does not apply to non-physical spaces.⁶² After the court’s decision, Target and NFB entered into a settlement agreement in which Target promised to ensure its website met online accessibility requirements within three years.⁶³ This case established the first federal precedent addressing website accessibility for commercial websites.⁶⁴

The Ninth Circuit in particular has seen an influx of cases and has maintained that a business must have a nexus to a physical location in order to be considered a place of public accommodation. In *Earll v. eBay, Inc.*, a deaf woman could not register as a seller on ebay.com because eBay did not allow an accommodation to the telephonic identity verification.⁶⁵ The court

55. *Id.* at 953–56, 958.

56. *Id.* at 953.

57. *Id.* at 956.

58. *Id.* at 953.

59. *Nat’l Fed’n of the Blind v. Target*, 452 F. Supp. 2d at 953–54.

60. *Id.* at 954.

61. *Id.* at 952.

62. *Id.*

63. Settlement Agreement, *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006); *National Federation of the Blind (NFB), et al. v. Target Corporation: DRA Case Sets First Precedent in the Country Regarding Website Accessibility*, DISABILITY RTS. ADVOCS., <https://dralegal.org/case/national-federation-of-the-blind-nfb-et-al-v-target-corporation> (last visited Dec. 28, 2020) (near the bottom of the page, there is a PDF link to the actual Settlement Agreement and Release).

64. *National Federation of the Blind (NFB), et al. v. Target Corporation: DRA Case Sets First Precedent in the Country Regarding Website Accessibility*, DISABILITY RTS. ADVOCS., <https://dralegal.org/case/national-federation-of-the-blind-nfb-et-al-v-target-corporation> (last visited Dec. 28, 2020).

65. *Earll v. eBay, Inc.*, 599 F. App’x 695 (9th Cir. 2015).

ruled that since eBay was not connected to a physical location, it did not need to comply with the ADA.⁶⁶

In another case, *Young v. Facebook, Inc.*, a California district court held the social networking website was not a place of public accommodation.⁶⁷ A user with a mental disability argued that Facebook failed to provide an accommodation to provide a human customer service system, assisting individuals with disabilities.⁶⁸ Applying the Ninth Circuit's precedent, the district court also said that Facebook's physical headquarters did not count as the nexus because that location is not where the inaccessibility occurred.⁶⁹ In 2012, the same California district court declared that the ADA did not apply to Netflix's online subscription streaming service because it was online-only and had no nexus to a physical location.⁷⁰

Most recently, Domino's lost a case at the Ninth Circuit, originally brought by a man who is blind.⁷¹ The man sued Domino's because he was unable to order any food on the Domino's website or the mobile application even with screen-reading software.⁷² A Ninth Circuit panel overturned the district court's dismissal of the suit and remanded to proceed with discovery.⁷³ Domino's filed a petition for certiorari to the U.S. Supreme Court along with a brief detailing the confusing circuit split in decisions regarding website accessibility; however, the Court denied Domino's petition.⁷⁴ Unfortunately, it did not give a reason for denying certiorari.

In contrast, the First, Second, and Seventh Circuits have moved away from the nexus test by deciding that websites should be made accessible to people with disabilities regardless of whether or not there is a nexus to a physical space. They have held that websites themselves are places of public accommodation.

The National Association of the Deaf (NAD) sued Netflix claiming the company failed to provide equal access to Netflix's website streaming service for individuals who are deaf and/or hearing impaired.⁷⁵ The NAD sought a court order requiring Netflix to provide closed captioning for all of its website content. Specifically, the NAD argued that Netflix's online streaming service fell into four of the categories listed as places of accommodation in the ADA: place of exhibition and entertainment, place of recre-

66. *Id.* at 696.

67. *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1116 (N.D. Cal. 2011).

68. *Id.* at 1114.

69. *Id.* at 1115.

70. *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012).

71. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 911 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

72. *Id.* at 902.

73. *Id.* at 911.

74. *Domino's Pizza LLC v. Robles: Petition for certiorari denied on October 7, 2019*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/dominos-pizza-llc-v-robles> (last visited Dec. 28, 2020).

75. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 199 (D. Mass. 2012).

ation, sales or rental establishment, and service establishment.⁷⁶ Additionally, NAD claimed Netflix was providing “a subscription service of internet-based streaming video through [its website]” and this is similar to a physical store that offers similar services, “such as a video rental store.”⁷⁷ Among other arguments, Netflix argued that its website could not be classified as a place of public accommodation because it could be “accessed only in private residences, not in public spaces.”⁷⁸ Netflix contends that all places of public accommodation “must be accessed outside of a private residence” because, according to Netflix, all of the examples in the statute are public areas outside of an individual’s home.⁷⁹ The court cited and agreed with the holding of *National Federation of the Blind v. Target*, emphasizing that the statute applies to “services ‘of’ a public accommodation, not services ‘at’ or ‘in’ a public accommodation.”⁸⁰ Therefore, even if a private residence is not itself a place of public accommodation, covered entities that provide services in the private residence may qualify as places of public accommodation. Examples include plumbers, food delivery services, and moving companies.⁸¹ Imagine if the companies who provide these services were exempted from the ADA based on Netflix’s reading of the statute. The court applied the reasoning of *Carparts Distribution Center*, and held if companies conducting business online were excluded from being covered by the ADA, that would conflict with the “purposes of the ADA and would severely frustrate Congress’s intent that individuals with disabilities *fully* enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public.”⁸² The court cited legislative history stating that Congress intended the ADA to adapt to changes in technology.⁸³

A few years later, NFB filed another lawsuit. This time, NFB challenged Scribd, Inc. for failing to design its digital reading subscription service to work with software used by the blind or visually impaired.⁸⁴ Scribd charges a flat monthly fee for access to the world’s largest digital library containing e-books, audiobooks, and other published documents.⁸⁵ Scribd’s argument was the same as most defendants in preceding cases: the ADA only applies to physical locations and does not apply to businesses that are entirely based on the internet.⁸⁶ The court disagreed. It explained that be-

76. *Id.* at 200; *see also* 42 U.S.C. § 12181(7) (2018).

77. *Nat’l Ass’n of the Deaf v. Netflix*, 869 F. Supp. 2d at 200.

78. *Id.* at 201.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 200 (quoting *Carparts Distribution Ctr. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994)) (emphasis added).

83. *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d at 199, 200–01.

84. *Nat’l Fed’n of the Blind v. Scribd*, 97 F. Supp. 3d 565, 567 (D. Vt. 2015).

85. *SCRIBD*, <https://www.scribd.com> (last visited Dec. 18, 2019).

86. *Scribd*, 97 F. Supp. 3d at 571.

cause the internet has a “critical role in the personal and professional lives of Americans,” keeping individuals with disabilities out of online platforms effectively defeats the congressional intent of the ADA of adapting to changes in technology.⁸⁷ This ruling ultimately resulted in a settlement agreement requiring Scribd to re-design its website to make content accessible and compatible with screen software used by the blind and visually impaired.

The First, Second, and Seventh Circuits agree that places of public accommodation include any business offering goods and services, even if only via the internet; while the Third, Sixth, and Ninth Circuits limit the definition of places of public accommodation to websites that have a nexus to a physical location, thus excluding internet-only businesses. For a concrete example, see the Netflix cases discussed previously. The business itself is entirely based online and has found itself on both sides of the split. In 2012, the U.S. District Court for Massachusetts held the subscription streaming website is a place of public accommodation.⁸⁸ Later that year, the U.S. District Court for the Northern District of California held the opposite, that Netflix’s internet-based service was not a place of public accommodation because it did not have a required nexus to a physical location.⁸⁹ Because of this inconsistency in interpretation of a “place of public accommodation,” there is no uniform way to assess whether businesses that provide internet-only services on a national scale must comply with the ADA. It would entirely depend on where the lawsuit is filed.

C. DOJ Guidance and Proposed Advanced Rulemaking in Expanding Title III Application to Online Platforms with or without a Nexus

Regardless of how the courts have fallen on the issue, the Department of Justice has consistently filed amicus briefs and position statements stating the ADA accessibility requirements apply to the internet as a place of public accommodation under Title III. Like some of the court decisions discussed previously, the DOJ emphasized that Title III’s language specifically states that it covers services “of” places of public accommodation, not “at” places of public accommodation.⁹⁰ If the definition were limited to services offered “at” a physical, public location, there would be a host of services that would not have to be accessible to those with disabilities.⁹¹

87. *Id.* at 571, 575.

88. *Nat’l Ass’n of the Deaf v. Netflix*, 869 F. Supp. 2d at 200–02.

89. *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012).

90. Brief for the U.S. Dep’t of Just. as Amici Curiae Supporting App. at 5, *Hooks v. OK-bridge*, 232 F.3d 208 (5th Cir. 2000) (No. 99-50891), <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/hooks.pdf>.

91. *Id.* at 9–10 (The DOJ lists examples for telephone or mail businesses as travel services, banks, insurance companies, catalog merchants, and pharmacies. It also gives examples for ser-

Any business conducted over the phone, through mail, or in the customers' home would not need to be accessible under this interpretation. Using Domino's as an example of a business with both a storefront and online service, this would mean Domino's stores would need to be accessible, but its phone lines and websites would not. Therefore, Domino's would be free to discriminate over the phone or online, but not in its store. The DOJ stated, "neither the language of the statute, nor the underlying purpose of the Act, require or permit such an absurd result."⁹²

Beyond filing amicus briefs and press releases, the DOJ released an advanced notice of proposed rulemaking (ANPR) in 2010, announcing that it was considering amending ADA Title II and III regulations clarifying standards in requiring "public entities and public accommodations that provide products or services to the public through [websites] on the internet to make their sites accessible to, and usable by, individuals with disabilities under the legal framework established by the ADA."⁹³ It went on to say that the DOJ "has repeatedly affirmed the application of [T]itle III to [websites] of public accommodations."⁹⁴ The DOJ stated that:

[T]he ADA's promise to provide an equal opportunity for individuals with disabilities to participate in and benefit from all aspects of American civic and economic life will be achieved in today's technologically advanced society only if it is clear to State and local governments, businesses, educators, and other public accommodations that their [websites] must be accessible.⁹⁵

These clarifications would effectively eliminate the nexus test and explain that the ADA is not simply limited to *physical* places of public accommodation.

Unfortunately, these proposed regulations keep being delayed. After numerous delays, the DOJ stated it would propose these new website accessibility regulations for Title II in 2016 and use that as a foundation for Title III website accessibility regulations in 2018.⁹⁶ This has again been pushed back. These delays have continued to allow increasing numbers of lawsuits and demand letters, all stating various online spaces are inaccessible to those with disabilities.⁹⁷ It is still unclear, however, whether any actual

vices provided in customers' homes or offices: plumbers, pizza delivery, moving companies, cleaning services, business consulting firms, and auditors).

92. *Id.* at 5.

93. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43462 (proposed July 26, 2010).

94. *Id.* (citing 28 C.F.R. § 35.102).

95. Kristina M. Launey et al., *Website Accessibility Lawsuits by the Numbers*, Seyfarth Shaw LLP (Mar. 14, 2016), <http://www.adatitleiii.com/2016/03/tracking-the-trends-website-accessibility-lawsuits-by-the-numbers>.

96. Title II Supplemental Advance Notice of Proposed Rulemaking seeking public comment through Aug. 8, 2016, 81 Fed. Reg. 28657 (proposed May 9, 2016).

97. Launey et al., *supra* note 95.

rules will be proposed. The Trump Administration issued its first Unified Regulatory Agenda in July 2017.⁹⁸ It listed online accessibility under the inactive list, which means that these rules have taken a backseat.⁹⁹ In further unfortunate news, the DOJ has continued to draw back previously made statements. In December 2017, it withdrew its 2010 ANPR, explaining it is now “evaluating whether promulgating regulations about the accessibility of web information and services is necessary and appropriate.”¹⁰⁰ As of the date of this article, there have not been any more updates. It appears there will be no new proposed regulations clarifying whether online spaces will be considered places of public accommodation, at least in the foreseeable future.

III. HEALTHCARE ACCESS AND DELIVERY IS DIFFERENT THAN OTHER COMMERCIAL BUSINESSES

Telemedicine companies have two potential arguments as to why they should not be considered places of public accommodation and therefore, not subject to Title III of the ADA. They could argue that, following the *Netflix* argument, places of public accommodation must be accessed outside of a private residence to satisfy the classification under the ADA. As discussed previously, this argument is not persuasive. Courts have determined that entities providing services in an individual’s home (like a plumbing business or a food delivery service) should fall under the place of public accommodation definition.¹⁰¹ They could also argue that they are not medical providers but rather technology companies that only host an online platform. However, this may not stick either. Many telemedicine companies either employ or contract with the doctors or healthcare organizations that use their platforms¹⁰² and the software has to be HIPAA-compliant (which means they are considered a covered healthcare entity).¹⁰³ Additionally, their service replicates going into a clinic, including having virtual waiting rooms for patients. These companies are not simply technology companies hosting a platform, they are facilitators of healthcare services.

Telemedicine is a service rendered entirely online. If we are adopting the “nexus” application, what would be looked at to determine the nexus?

98. Roy Maurer, *DOJ Halts Plan to Create Website Accessibility Regulations*, SOC’Y FOR HUM. RES. MGMT. (Sept. 25, 2017), www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/website-accessibility-disabilities-regulations-doj.aspx.

99. *Id.*

100. Dep’t of Just., Nondiscrimination on the Basis of Disability Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 15, 2017).

101. Nat’l Ass’n of the Deaf v. Netflix, 869 F. Supp. 2d at 201; Brief for the U.S. Dep’t of Just., *supra* note 90.

102. Foley & Lardner LLP, *Telemedicine Providers: Are My Doctors Employees or Independent Contractors?*, HEALTH CARE TODAY (July 7, 2015), <https://www.foley.com/en/insights/publications/2015/07/telemedicine-providers-are-my-doctors-employees-or>.

103. *HIPAA Guidelines on Telemedicine*, HIPAA J., <https://www.hipaajournal.com/hipaa-guidelines-on-telemedicine> (last visited Dec. 28, 2020).

The physical location where the physician or other healthcare provider is speaking from or the location where the patient is sitting? The healthcare service is provided virtually in the convenience of the patient's home, similar to Netflix's streaming service. Title III specifically lists "pharmacy. . . health care provider, hospital, or other service establishment."¹⁰⁴ I argue that telemedicine platforms fall under this definition. Even if the companies hosting these services refuse to acknowledge they are healthcare providers, the statute expressly states, "*other* service establishments."¹⁰⁵ They are providing an online service and should be prohibited from discriminating in these services. They should be held to the same accessibility standards as physical health care providers. If they are not, then medical and healthcare services would have to be accessed at a physical location, and many who would greatly benefit from telemedicine would be pushed out.

Additionally, the need for telemedicine to be accessible to individuals with disabilities is different than accessibility for all other commercial businesses. Healthcare is a necessity.¹⁰⁶ Disability-related healthcare expenses totaled \$397.8 billion in 2006.¹⁰⁷ In 2015, approximately fifteen million Americans received medical care via telemedicine.¹⁰⁸ Though not having access to online commercial businesses like Amazon, Netflix, or eBay excludes individuals with disabilities from participating in today's society, not having adequate access to new forms of healthcare delivery is even more intrusive on people's lives.

IV. CONCLUSION: WHERE DO WE GO FROM HERE?

The ADA remains silent on its application to online platforms. We do not have any concrete national mandate on the issue, either. How should we proceed in an age where these online spaces can be accessed from anywhere, rather than just a storefront? Currently, it seems that this question is being left to the courts, but that cannot be a long-term solution. Otherwise, we will be left where we are now: different jurisdictions drawing their own interpretations. This results in plaintiffs "jurisdiction-shopping" for advantageous courts, defendants confused about how to apply any potential court mandates to websites accessed nationally, and judicial resources being consumed by these differences in interpretation. As the Supreme Court has refused to take up the Domino's case, it may be years before it decides to take up a case with this exact issue. Meanwhile, technology is advancing every

104. 42 U.S.C. § 12181(7)(F) (2018).

105. *Id.* (emphasis added).

106. There is much argument politically whether healthcare is a right or a commodity. Regardless of how you view it, we all need healthcare access at some point in our lives.

107. Wayne L. Anderson et al., *Estimates of State-Level Health-Care Expenditures Associated with Disability*, 125 PUB. HEALTH REPS. 44, 46 (2010).

108. John Donohue, *Telemedicine: What the Future Holds*, HEALTHCARE IT NEWS (Sept. 6, 2016), <https://www.healthcareitnews.com/blog/telemedicine-what-future-holds>.

day, and there has already been an explosion of website accessibility cases filed in federal courts all over the nation. In 2018, there were 2,285 cases of individuals with disabilities filing federal lawsuits for Title III violations by websites, increasing from 815 in 2017.¹⁰⁹ The 2019 total is projected to exceed 3,200 by the end of the year.¹¹⁰ With the circuit courts split on the issue, individuals with disabilities are entirely at the mercy of which state they happen to live in.¹¹¹

Congressional action would be the most effective and efficient solution. Congressional comments already illustrate that Congress intended the ADA to evolve as technology advances.¹¹² The ADA has not been updated in more than a decade, and when the ADA was enacted, the internet did not exist as it does now. Going through Congress may not be the quickest resolution because drafting new legislation and gathering support is time consuming. However, it is the best way to attain a solution that will provide the most closure on interpreting online platforms as places of public accommodation. If Congress decides to take up this onerous task, it should illustrate specific measures that people and courts can use in determining which websites fall under the scope. There are already guidelines for assessing whether government websites satisfy accessibility standards. This would be a logical framework in beginning to apply to privately-owned online spaces.¹¹³ Though this would be the best solution, it may be made difficult by partisanship and lack of compromise. There would need to be wide support across the political aisle for these updates to achieve majority approval.

Society has become increasingly dependent on the internet in the past decade, and this dependence is only expanding. Access to services provided over the internet, whether or not the website is attached to a physical location, is imperative for individuals with disabilities to fully participate in today's economy and society. If online platforms are not required to comply with the ADA's requirements for public accommodations, individuals with disabilities will be isolated and frozen out of these online-only spaces and services (e.g., Amazon, Netflix, etc.). This is especially critical in the healthcare industry as telemedicine becomes more prevalent. Telemedicine

109. Melanie A. Conroy et al., *When Good Sites Go Bad: The Growing Risk of Website Accessibility Litigation*, NAT'L LAW REV. (Aug. 2, 2019), <https://www.natlawreview.com/article/when-good-sites-go-bad-growing-risk-website-accessibility-litigation>.

110. *Id.*

111. Additionally, asking the state legislatures to draw up guidelines applying or not applying their definitions of places of public accommodation might not be advisable because it is not entirely decided whether states can legally regulate the internet under the Commerce Clause. Could this issue be handled by state ADA laws or interpretation? Probably not. Even if states could, this would still be a patchwork solution and completely dependent on which state's laws compound.

112. H.R. REP. NO. 101-485(II), at 108 (1990) ("[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times.").

113. 29 U.S.C. § 794d (2018).

companies should be required to accommodate individuals with disabilities because these individuals can benefit from telemedicine the most.

Courts have applied the ADA to other technological advances (like services provided over the phone) as places of public accommodation because of society's dependence on those devices. So, it is logical for courts to include the internet as a place of public accommodation. If Congress does not act or the courts continue to be inconsistent, barriers to participating in normal daily activities that have moved online will remain for individuals with disabilities.